No. 07-629

Supreme Court, U.S.
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In The

Supreme Court of the United States

FELIPE MENDEZ, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT JUDGE AND THE EIGHTH CIRCUIT COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S HOLDINGS IN *HOLLOWAY V. ARKANSAS* AND *CUYLER V. SULLIVAN* WHEN FACED WITH AN ACTUAL CONFLICT OF COUNSEL ISSUE WHICH WAS RAISED AND BECAME A SUBSTANTIAL FACTOR IN CONVICTION OF FELIPE MENDEZ, JR. IN VIOLATION OF MENDEZ'S SIXTH AMENDMENT STRUCTURAL AND FIFTH AMENDMENT DUE PROCESS RIGHTS?

2. WHETHER TRIAL COURT ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL COMBINED TO DENY EXCLUSION OF *TERRY* STOP EVIDENCE USED AGAINST MENDEZ AT TRIAL THAT DERIVED FROM A "PROFILE" STOP AND SEIZURE, IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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The decision in the Eighth Circuit Court of Appeals may be found at 492 F.3d 930, C.A. 8 (Iowa).

The trial court's order regarding Motion to Suppress may be found at 351 F. Supp.2d 896, S.D. Iowa No. 4.04-cr-199.

JURISDICTION

This is a timely filed Petition for Writ of Certiorari from Denial of Hearing En Banc and/or Rehearing filed August 7, 2007. Defendant was charged in Federal Court with violations of 21 U.S.C. § 841 and 21 U.S.C. § 846. Defendant was tried in the Southern District of Iowa and appealed to the Eighth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT FOUR

"The right of the people to be secure in their persons, houses, paper and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized."

AMENDMENT FIVE

"No person shall be held to answer for a capital or otherwise infamous crime . . . Nor be deprived of life, liberty or property without due process of law."

AMENDMENT SIX

"In all prosecutions the accused shall enjoy. . . and . . . Have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Felipe Mendez, Jr. and others were indicted in the United States District Court for the Southern District of Iowa. The charge was Conspiracy to Distribute a Controlled Substance, methamphetamine in Violation of 28 U.S.C. §§ 841, 846.

For a period of some significant time, law enforcement was investigating distribution of methamphetamine in the Des Moines, Iowa locale. (Des Moines is in the Southern District of Iowa). An early event that helped start the investigation was a Nevada stop and search of an automobile driven by one Mr. Cruz also occupied by a passenger. The vehicle was seized and about 20 pounds of methamphetamine were found in a secret compartment of the white BMW. (Trial Tr. pp. 37-39)

Meanwhile, in Des Moines, Agent DeJoode, a member of a multi agency drug task force developed a confidential informant who led him to Katherine Boatwright. Over a period of time, DeJoode's informant was able to make controlled meth buys from Ms. Boatwright. During that same interval, the informant became familiar with Boatwright's travels and observed or was told about multiple cars used to mule the drug from California to Des Moines. A red Volkswagen Jetta was not among those cars. They did, per informant, include a white BMW, a Chevy Blazer, and a Lexus.

Near in time to July 8, 2004, the date of arrest of Mendez and others, the informant also told law enforcement of a belief that Boatwright's meth came from a Hispanic man from California. (Supp. Hrg. Tr. pp. 14-15)

The drugs were muled from Southern Central California to Des Moines by auto. The quantities were quite large, often reaching 20 or more pounds of methamphetamine per load. Other Des Moines area conspirators were identified as Phillip Gatewood, Jody Cannon, and Isabel Rodriguez. The informant had heard the name "Alex" in connection with the main man in California. Another conspirator was charged with a serious violent crime in Des Moines. Boatwright became the agent for "Alex" in trying to arrange bail for that man. That attempted transaction took place by phone.

The Iowa authorities monitored the methamphetamine activities of this group, continuing to gather intelligence over a term of months. From time to time they ran surveillance on Boatwright's house in Des Moines. According to the informant, he had not seen Hispanic persons going in and out of Boatwright's home, her base of operations. Surveillance did not produce any particular pattern of who came and went to and from Boatwright's. Per the informant, from time to time, Boatwright left town, ostensibly to California. (Supp. Hrg. Tr. pp. 37-40)

The record does not establish with any certainty the destination for Boatwright's trips until follow-up developed the last trip before arrests. That was a trip to California. It was short in duration and Boatwright had returned in the one or two days preceding arrests. (Supp. Hrg. Tr. p. 39)

Based upon all of this, DeJoode obtained a search warrant for Boatwright's home. With warrant in hand, DeJoode sat on surveillance there during the one or two days after her trip return. During the pre-arrest period, DeJoode did not witness the arrival of any of the described mule vehicles nor any identifiable males or females. At about 3 o'clock p.m. on the 8th day of July, an agent saw two Hispanic males leave Boatwright's house. (Supp. Hrg. Tr. pp. 16-17, 35-37) No one had informed him of their arrival nor anything else about these two men. They got into a red Volkswagen Jetta automobile with a Des Moines area license plate. (Supp. Hrg. Tr. pp. 16-17, 41) It had never been identified or suggested to be a mule or other

automobile connected to the conspiracy. The Jetta committed absolutely no law violation as it left. *Id.* DeJoode radioed another surveillance car to follow and then he ordered the stop of the Jetta. The other agent tailing did not observe, nor report any law violation by the Jetta or its occupants. *Id.* The Jetta was stopped a short distance from Boatwright's house and at about the same time as the search warrant was executed, DeJoode drove to the place where the Jetta was stopped and held by the other agent(s). (Supp. Hrg. Tr. pp. 17-19) DeJoode approached the car, occupied by the two Hispanic males. He asked the driver (who turned out to be Mendez) for ID/drivers license. The other occupant was determined to be Santamaria. Mendez produced a California Drivers License. (Supp. Hrg. Tr. p. 20) Upon further questioning, DeJoode requested more information from Mendez. Mendez produced another license from California in the name of Felipe Mendez, Jr., his true name. Mendez said something about having been told he should have more than one ID, because of the nature of the times we live in. DeJoode was quite suspicious of this and of course at that point he had discovered evidence of some kind of crime, possession of a false drivers license. Another agent had been dealing with the passenger. (Supp. Hrg. Tr. pp. 22-23, 42-44) A quick on-scene search of Mendez, his passenger and the Jetta was done. DeJoode suggested going to a law enforcement office to sort things out, so to speak. However, even at that point, DeJoode had discovered no illegal matters about the Jetta. It was properly licensed and registered. (Supp. Hrg. Tr. pp. 22-23)

An impound search of the Jetta revealed two "duffel bags", one with over $4,000.00 in cash. Also in the vehicle was found little piece of cardboard, consistent with drug packaging. A "zip-loc" box (Supp. Hrg. Tr. pp. 22-24) However, no contraband per se was discovered during the search. The transcribed record does not mention any discovery of "secret" compartments, in the seized Jetta. While in the local office, DeJoode made his determination that Mendez was not in the U.S. legally. During the life of the prosecution, neither duffel was ever proved to belong to Mendez. However, the U.S. currency seized included several bills that had been serialized and used in an undercover, controlled recent drug purchase from Boatwright. (Trial Tr. p. 554) During the execution of the search warrant at Boatwright's home, agents found baggies with corners gone, and a box for baggies supposedly like the cardboard in the Jetta. Boatwright and others ultimately charged were found in Boatwright's house. One charged alleged conspirator was found in the bathroom of the house and a small amount of methamphetamine was also found in the bathroom.

Ultimately, Mendez, Isabel Rodriguez, Gascon Guerrero, Gatewood and Santamaria went to trial on the conspiracy charge(s). The other co-conspirators became witnesses for the Government.

During the post-indictment phase of the case, Mendez had several different lawyers before settling upon Mr. McCarthy for trial counsel. One of the first of the series of counsel filed a motion to suppress evidence discovered from the warrantless seizure and

search of the Jetta and Mendez. Another successor counsel, Mr. Brown, did a very detailed supplement to that Motion adding factual information and case citations for the motion. (Clerk's Docket No. 70) The motion remained an assertion of a warrantless seizure and search.

The motion continued to attack a *Terry v. Ohio*, 392 U.S. 1, 85 S. Ct. 1868 (1968) exception, as well as the generalized automobile exception to warrant. The Government filed a resistance with authorities; all of its contents were directed toward defending a *Terry* stop or other warrantless exception to the Fourth Amendment prohibition against unreasonable warrantless search and seizure. As time progressed to the date for the suppression hearing, there was never any attempt by the Government to invoke authority to stop the Jetta because of the Boatwright warrant. At no time was the defense attacking a search pursuant to warrant. By the time for hearing, Mendez was represented by yet another lawyer, Mr. Parrish of Des Moines, Iowa. The case had been assigned to the Honorable Robert W. Pratt, District Judge for the Southern District of Iowa. Proceedings were held in Des Moines, Iowa U.S. Courthouse, the main courthouse for that District Court. Assistant U.S. Attorney General, John Courter, handled the case and suppression hearing for the Government. Mr. Parrish and his client, Mendez, were present at hearing. The only witness was DeJoode. Before the hearing on the merits of the motion, Mendez himself asked for continuance, wanting to hire another new attorney.

After an exchange with Mendez, Judge Pratt then turned to Mr. Parrish and stated "It is your motion counsel, you have the burden of proof." Mr. Parrish followed the Court's demand and called DeJoode and questioned him. At no time did the AUSA offer to accept the burden of proof which was his by law. At no time during the hearing did Judge Pratt correct the erroneous burden of proof assignment. AUSA Courter cross-examined his own agent witness. DeJoode's testimony at that hearing has been summarized earlier in this statement. On the 23rd day of December, 2004, Judge Pratt filed his ruling, denying the exclusion of potential evidence gained by the stop, seizure and search of Mendez, his passenger and the Jetta automobile. However, for Petitioner, the most significant part of his ruling is the substantial amount of space he devoted to advising and warning law enforcement against the apparent "profiling" in Mendez's case. In spite of those cautions Judge Pratt never reversed that ruling against exclusion. (Clerk's Docket No. 90)

At trial, the evidence against Mendez was provided by numerous co-conspirators, DeJoode, and the Nevada trooper whose stop out west of the BMW was relayed to the Des Moines area task force. The serialized money (photographs) came into evidence. The multiple identification documents found on Mendez came in; the baggie box items came in as typical dealer packaging. Obviously, his presence at the Boatwright home came before this jury; presence on the day of the execution of the search warrant and his

presence in Des Moines the day after Boatwright flew back from California. The mortgage amount related to Felipe's California home came in. His tax returns were in evidence. (Trial Tr., pp. 632)

Evidence was offered that the Nevada White BMW was at one point titled in Mendez's wife's name. Phone records of Boatwright, allegedly included calls to "Alex" (Mendez and Alex were claimed to be one and the same.)

However, there was something special about one of the Government's witnesses offered to convict Mendez. Carlos Gil was called to the stand. Before he actually said anything, counsel for Mendez asked for a conference at the bench. The lawyer informed that Gil was at that time counseled by Mr. Brown; this is the same Mr. Brown who had done the detailed and law supported supplement to Mendez's Motion to Suppress. The Government did not deny Attorney Brown and Gil representation which was in existence while Gil testified against Mendez. Judge Pratt decided to allow Gil to testify and then would make a record. This is what appeared to have happened since there is no record of who said what at the bench; there was, however, a record of sorts made during that first recess after Gil testified. (Trial Tr. p. 205) Gil identified himself as a confederate of Mendez, described a car of Mendez's that Mendez used in Des Moines for their meetings. He said he knew Mendez as "Alex." At the least, he testified to around eight or more pounds of methamphetamine purchased from Mendez. This was put atop the pile of co-conspirator

testimony. The record on the conflict was left open. The next day Mendez's lawyer abandoned making a record. (Trial Tr. p. 325) The reason is not shown in the record.

The jury returned guilty verdicts on July 1, 2005.

New counsel timely filed a motion for new trial, raising the issues identified in this petition. New trial was denied and judgment was pronounced January 19, 2007. (Clerk's Docket No. 329) Notice of Appeal to the Eighth Circuit Court of Appeals was filed. The case was argued March 14, 2007, and decision was filed on the 5th day of July, 2007. Petition for Rehearing and Hearing En Banc was denied on August 7, 2007. This petition is filed with the Court within 90 days of that denial.

ISSUES IN SUPPORT OF GRANTING THE WRIT

I. WHETHER THE TRIAL COURT JUDGE AND THE EIGHTH CIRCUIT COURT OF APPEALS FAILED TO FOLLOW THIS COURTS HOLDINGS IN *HOLLOWAY V. ARKANSAS* AND *CUYLER V. SULLIVAN* WHEN FACED WITH AN ACTUAL CONFLICT OF COUNSEL ISSUE WHICH WAS RAISED AND BECAME A SUBSTANTIAL FACTOR IN CONVICTION OF FELIPE MENDEZ, JR. IN VIOLATION OF MENDEZ'S SIXTH AMENDMENT STRUCTURAL AND FIFTH AMENDMENT DUE PROCESS RIGHTS.

"Federal Courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who perceive them." *Wheat v. United States*, 486 U.S 153, 160, 108 S. Ct. 1692, 1698 (1988). In *Wheat*, a group of defendants in the same drug conspiracy wished to share the services of one counsel. *Wheat*, at 155 and 1692. The Government resisted this arrangement, arguing that pending cooperation agreements would inevitably create an in-trial conflict of interest, and the court would be enmeshed in a genuine conflict of counsel situation. *Wheat*, at 156 and 1695. With a cooperating witness waiting in the wings, sure to be cross-examined by his own counsel, the District Court

disallowed the multiple representation. *Wheat*, at 157 and 1696.

The right to counsel is secured to a defendant by the Sixth Amendment of the United States Constitution " . . . in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

This Court worked its way through difficult cases inuring this Sixth Amendment right within *Powell v. Alabama*, 287 U.S. 45, 69 S. Ct. 55 (1932) through *U.S. v. Ash*, 413 U.S. 300, 93 S. Ct. 2568 (1973). In between, the foundational case, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963) held that for any serious offense, the right to counsel must be secured. Key to the right to counsel is the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). "Thus, while the right to select and be represented by one's preferred attorney, is comprehended by the Sixth Amendment, the essential aim is to guarantee an effective advocate. . . ." *Wheat*, at 159 and 1697.

The holding in *Wheat* is basically founded upon the two most often considered decisions on a trial court's duties when an actual conflict arises or the possibility of counsel conflict exists. *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708 (1980). In *Wheat*, discussing the ABA Model Code of Professional Responsibility and other such ethical guides, this Court stated, "Not only the interest of a criminal

defendant but the constitutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." *Wheat*, at 160 and 1698. For Mr. Mendez, the testimonial co-conspirator appearance of Carlos Gil, a defendant now represented by Mr. Brown, one of Mendez's counsel in the case on trial, has been given short shrift. Although the existence of attorney client conflict is acknowledged by the Eighth Circuit Court of Appeals, it is passed over as insignificant (Opinion, pp. 20-21) Further, the Circuit Court found that the issue had been abandoned by Mendez. (Opinion, pp. 21-22) The words of trial counsel, while suggesting waiver of Mendez's complaint, is not the effective assistance of counsel (Opinion, pp. 21-22) to which Mendez was entitled. In *Strickland*, at 690 and 104 S. Ct. 2052, this Court held that "the reasonableness of counsel's challenged conduct must be judged on the facts of the particular case, viewed as of the time of counsel's conduct." In this trial, however, neither the trial judge nor defense counsel undertook their essential duties to Mendez and the questioned integrity of the criminal justice system, including the *appearance of impropriety*. [emphasis applied] In *Holloway*, *supra*, when the trial judge is informed of a conflict (not just a possible conflict) regarding trial counsel, the court, itself, must investigate the nature of the conflict and its potential for injury to the propriety of the trial process. *Holloway*, at 484 and 1178-9. Also, within the context of trial counsel conflict, if such conflict is shown, but not properly acted upon by the trial court, prejudice is presumed. *Holloway*, at 489

and 1181. The Eighth Circuit knew this body of law. *Holloway* is an Eighth Circuit case. And, the Eighth Circuit and Mendez's trial judge had applied *Holloway* to soundly criticize and reverse a State of Iowa trial court. See, *Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999), *Atley v. Ault* certainly opened the eyes of Iowa trial judges and Iowa's Appellate Courts. See *State v. Powell*, 684 N.W.2d 235 (Iowa 2006), *State v. Watson*, 620 N.W.2d 233 (Iowa 2001). *Holloway* is a clearly framed rule for counsel conflict. It clarified *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457 (1942). If a conflict exists, the judge must act.

In its Mendez opinion, the Eighth Circuit persists, as did the trial judge, in treating the identified conflict as a mere possibility. (Opinion pp. 21-22) The Eighth Circuit characterizes Mendez's situation in the context of *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708 (1980) at pages 21-23 of its opinion. *Cuyler* stands for the proposition that even in the trial attorney context, there must be a showing of a actual conflict and not just possibility. *Cuyler*, at 350 and 1719. "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler* at 348 and 1718.

At the very least, trial counsel for Mendez should have moved to strike Gil's testimony and should have requested an admonition. The failure to do so

breaches an essential attorney duty under these unique circumstances.

The fact that Attorney Brown prepared a Supplement to Motion to Suppress, and was in Mendez's case for a short period before he became Gil's negotiating Attorney does not render this incident meaningless and non-prejudicial. This is because a defendant in a criminal case is entitled to effective assistance of counsel in all critical stages of prosecution proceedings. *Powell v. Alabama* 287 U.S. 45, 53 S. Ct. 55 (1932). A matter that includes post-arrest line up is a critical stage. *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999 (1970), *U.S. v. Wade*, 388 U.S. 218, 87 S. Ct. 1926 (1967). In *Powell v. Alabama*, *supra*, this Court recognized that from arraignment to trial is " . . . perhaps the most critical period of the proceedings. . . ." *Powell*, at 57 and 59.

The matter of fact is that either the Circuit Court's or the trial court's acknowledgment would require reversal and analysis of harmless error under *Cuyler* and this Court's most recent opinion in *U.S. v. Gonzales-Lopez*, 126 S. Ct. 2557 (2006). There was structural error here not susceptible to that easy remedy.

II. WHETHER TRIAL COURT ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL COMBINED TO DENY EXCLUSION OF *TERRY* STOP EVIDENCE USED AGAINST MENDEZ AT TRIAL DERIVED FROM A "PROFILE" STOP AND SEIZURE, IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

On December 14, 2004, Mendez's Motion to Suppress, Clerk's Docket Nos. 35, 76, 78 came on for hearing. Attorney Parrish was Mendez's attorney at the time. (Supp. Hrg. Tr. pp. 2-6) In spite of the fact that all attorneys had raised and briefed the motion as an attack on a warrantless *Terry* stop, the trial court placed the burden of proof upon Mendez.

> Mr. Mendez at this point in time the lawyer has filed a motion, and at least two briefs, and this morning I think a third alleging that the search that was done is illegal. *You have the burden of proof on that issue.* [emphasis applied] (Supp. Hrg. Tr. p. 6)

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Fourth Amendment, United States Constitution. Warrantless searches are presumed to be unreasonable unless they are searches subject to a few specifically established exceptions. *U.S. v. Ross,* 456 U.S. 798 (1982); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *U.S. v. Leon,* 468 U.S. 897 (1984); *California v. Acevedo,* 500 U.S. 565 (1991). Those exceptions may include a search incident to arrest, *Chimel v. California,* 395 U.S. 752 (1969); Search of an automobile *Coolidge v. New Hampshire, supra*; *Carroll v. U.S.,* 267 U.S. 132 (1925) and, as is relevant, a reasonable stop of an individual, including an individual in a vehicle when law enforcement can provide a reasonable and articulable suspicion of criminal conduct or observes the commission of a criminal act. *Terry v. Ohio,* 392 U.S. 1, 30, 855 S. Ct. 1868 (1968). On September 3, 2004, Mendez's lawyer filed a motion to suppress. Clerk's Docket No. 35. Although the motion to suppress acknowledged the existence of a warrant in specific relationship to the Boatwright residence, as well as certain named persons therein, the motion centered on the issue of the warrantless stop of the red Jetta Volkswagen and the lack of reasonable suspicion to justify the stop in the absence of observation of a criminal violation. On September 15, 2004, the government filed its response to that initial motion to suppress, and nowhere therein did it seek to justify the stop of the red Jetta and the resulting search on the basis of the "Boatwright warrant." Clerk's Docket No. 43. On October 20, 2004, Clerk's Docket No. 76, a lengthy and detailed supplement to the motion to suppress was filed by another trial counsel for

Mendez. The clear thrust of that supplemental motion was the attack upon a warrantless search. On the 25th of October, 2004, in Clerk's Docket No. 78 the government again filed a brief and memorandum in opposition to the motion as supplemented and again did not seek to bring the stop of the Jetta and resulting seizure and search within the scope of the warrant. Finally, on December 14, 2004, by another trial counsel, an amended and supplemented motion to suppress was filed, again, referencing the existence of the "Boatwright warrant" but solely attacking the stop, seizure and search on the basis that it was warrantless and lacked the necessary reasonable articulable suspicion to justify it. (Supp. Hrg. Tr. p. 6)

Following further discussions between the court and Mr. Mendez on his claim of lack of preparation and desire for other counsel, the court directed its attention to his lawyer, and stated "You may proceed with your case, counsel." (Supp. Hrg. Tr. 7) It is noteworthy that the government's lawyer did not take that opportunity to alert the court that the sole issue before it was a warrantless stop, seizure and search. Had the government done so, the court would have been alerted to its error in the placement of burden of proof and the government then could have gone forward to meet its lawfully placed burden; to prove by a preponderance of the evidence that the warrantless stop, seizure and search met a constitutionally approved exception to the warrant requirement. *Carroll v. United States, supra*; *U.S. v. Matlock,* 415

U.S. 164 (1974); *Bumper v. State of North Carolina,* 391 U.S. 543 (1968); *Vale v. State of Louisiana,* 399 U.S. 30 (1970). Recently, in a concurring opinion within *Illinois v. McArthur,* 531 U.S. 326, 338 (2001). The Honorable Justice David Suiter affirmed, " . . . most states follow the rule which is utilized in the Federal Court; if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant, the burden of proof is on the prosecution." This position has been repeatedly adhered to in the Eighth Circuit. *U.S. v. Marshall,* 986 F.2d 1171 (8th Cir. 1993); *U.S. v. Hill,* 386 F.3d 855 (8th Cir. 2004). As the Eighth Circuit has noted, "Searches conducted without a warrant are per se unreasonable, subject to a few well-established exceptions." *Hill* at 858.

Here, the government claims that the stop, seizure and search of the Jetta vehicle was a "*Terry* Stop." *Terry v. Ohio,* 392 U.S. 1, 85 S. Ct. 1868 (1968). The primary testifying agent at the suppression hearing acknowledged that the search warrant did not contain the information upon which he based his order for other agents to make the Jetta stop. Supp. Hearing pp. 12-30. At page 30 of the Suppression Hearing Transcript, Agent DeJoode says, "In my affidavit – and this was a search for a residence, that it was not a search warrant for Felipe Mendez or the vehicle." Felipe Mendez, Jr. was denied the effective assistance of counsel at his motion to suppress hearing. A defendant at a criminal trial and all meaningful stages of that trial is entitled to the effective assistance of counsel under the Sixth Amendment to

the United States Constitution. *Strickland v. Washington,* 466 U.S. 668 (1984). In order to show that counsel was ineffective, a defendant must establish that counsel failed to perform an essential duty and prejudice resulted. *Strickland* at 689. As to prejudice, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. There can be no logical explanation for a competent lawyer taking on a burden of proof on such a significant constitutional issue, when The Constitution and the laws derived therefrom do not place it upon the defendant. The notions of strategy or reasonable trial and trial preparation tactics cannot even come into play as a reason for counsel's substantial error. Unfortunately, the court compounded the significant error by placing the burden upon defendant. This was done in spite of the fact that none of the pre-hearing suppression memoranda briefs or motions attempted to bring this stop, seizure and search within the scope of the "Boatwright warrant."

Nowhere in the thirteen-page memorandum and order on defendant's motion to suppress evidence filed December 23, 2004, (Clerk's Docket No. 90) does the court acknowledge its erroneous placement of the burden. The trial court's analysis which starts on page 7 of the ruling does not place the burden on the government to show that this stop, seizure and search fits within a recognized exception to the warrant

requirement. Although the court quotes numerous cases which discuss that burden of proof, the court never takes it into account. The court states "the government concedes that no probable cause existed based upon a traffic violation, and that no probable cause existed under the search warrant, to stop the defendant. Instead, the government contends reasonable suspicion existed to believe the persons in the Jetta were involved in criminal activity." (Order Denying Suppression, p. 8) In its ruling, the court does face head-on the "specter of racial profiling." (Order Denying Suppression, p. 8) On page 9, the court says "the existence of the search warrant confirmed that on-going criminal activity likely existed at the residence. The key issue for this analysis, is whether the defendant could reasonably be linked to that activity given Agent DeJoode's information at the time." The court then goes on to rationalize that essentially since no other Hispanic people were known to frequent the residence, then Hispanics who might be present on July 8, 2004 must be criminally involved. *Id.* at 9. The court then turns to the warrant which was particular in its place or persons to be searched for a justification of DeJoode's national origin-based decision. (Order Denying Suppression, p. 10) Finally, having upheld Agent DeJoode's suspicions, the court says "that said, the court is troubled that up until his actual identification was secured, the defendant was only identified as being part of a racial minority and stopped largely because of that generalized identification." (Order Denying Suppression, p. 11) The court then goes on farther to say "it is this court's hope, however, that the government

continues to sensitize its agents to the perception of the minority communities it serves, and bear in mind identifications based on generalized racial groupings in support of search's and seizure's risk undermining the support that is so crucial to good police work." *Id.* at 11.

Addressing this issue raised by motion for new trial, the court in its ruling on the suppression issue rationalizes the placement of the burden of proof by directing attention to defense counsel who himself offered the warrant into evidence. (Supp. Order p. 16) The fact that defense counsel would take such an erroneous step indicates that he had no concept of the assignment of burden of proof in this hearing. The court acknowledges on page 16 of the Ruling on New Trial Motion (Clerk's Docket No. 327), that the government never made an argument at hearing or in submissions that claimed the warrant covered the stop, seizure and search. To complete the rationalization process, the court then indicates that there was a brief period of time when defendant assumed a burden and then it somehow shifted to the government. The court even rationalizes that the transcript reflects that everybody understood where the burden lay. (Clerk's Docket No. 327) The court indicates "this understanding is also reflected in the court's memorandum and order (Clerk's Docket No. 90)." The fact is as previously noted, the ruling never places the burden where it belonged. Finally, Mendez is required to demonstrate prejudice as previously noted. The prejudice to defendant can be clearly seen in the

closing salvos of the government cross-examination of Felipe Mendez, Jr. The pre-serialized "buy money" was the only physical evidence of criminal conduct that could be attributed to Mendez because of his presence at the Boatwright residence and his presence in the Volkswagen Jetta where the money was found. All of the other evidence came from snitches and co-conspirators who had made deals in return for their assistance to the government. It is sometimes said that errors by a trial court sitting alone finding facts and applying the law are more easily cured and prejudice avoided. The problem with that position in Mr. Mendez's case, is that a burden of proof creates an expectation. A burden of proof on the evidence beyond a reasonable doubt at trial, not only entitles, but compels jurors to expect the government to meet its burden of proof. The mental status of a judge who perceives a burden of proof at the commencement of a hearing to the court is no different. Felipe Mendez, Jr. should not have been required to prove that the stop, seizure and search of his person and the Jetta automobile were unreasonable by preponderance of the evidence. Unfortunately, because of the ineffective assistance he received from counsel as well as the trial court's error, he was prejudiced.

CONCLUSION

Petitioner requests that this Court enter an order, granting review and merits briefing, especially in light of attorney ethics considerations. This Court's guidance is sorely needed by bench and bar on that matter.

The present tense circumstances of the United States, requires the Court to examine this "profiling" issue.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-4071

United States of America, Plaintiff-Appellee, v. Isabel Ramon-Rodriguez, also known as Ramon Herrera-Cisneros, Defendant-Appellant.	*	Appeals from the United States District Court for the Southern District of Iowa.

No. 06-1339

United States of America, Plaintiff-Appellee, v. Felipe Mendez, Jr., Defendant-Appellant.	*	

No. 06-1572

United States of America, *
Plaintiff-Appellee, *
v. *
Cesar Daniel *
Gascon-Guerrero, *
Defendant-Appellant. *

No. 06-2579

United States of America, *
Plaintiff-Appellee, *
v. *
Sergio Santamaria, *
Defendant-Appellant. *

Submitted: March 14, 2007
Filed: July 5, 2007

Before MELLOY, SMITH, and BENTON, Circuit Judges.

MELLOY, Circuit Judge.

Four defendants in a drug distribution conspiracy appeal their convictions and sentences resulting

from a joint trial. Arguments on appeal include claims that: there was insufficient evidence to support the convictions; an attorney labored under a conflict-of-interest; a *Terry* stop was constitutionally unreasonable and evidence found as a result of the stop should have been suppressed; drug quantity calculations at sentencing were clearly erroneous; prior convictions were improperly used to enhance sentences; and a "willful blindness" instruction was improperly submitted to the jury while a "single vs. multiple conspiracy" instruction was not. We affirm the judgment of the district court.[1]

I. Background

We present the facts in a light most favorable to the verdicts, drawing all reasonable inferences from the evidence that support the jury's verdicts. *United States v. Cannon*, 475 F.3d 1013, 1016 (8th Cir. 2007). Details surrounding the investigation and events leading to the defendants' arrests were introduced at the joint trial of the four defendants largely through the testimony of officers engaged in investigation of the conspiracy. Co-conspirators who pleaded guilty and agreed to cooperate with the government testified as to their respective roles and provided details about the workings of the conspiracy and the roles of the present four defendants within the conspiracy. In

[1] The Honorable Robert W. Pratt, Chief Judge, United States District Court for the Southern District of Iowa.

addition, defendant Felipe Mendez, Jr. ("Mendez"), testified, and a number of inmates housed with the defendants relayed statements the defendants had made while incarcerated.

Officers began investigating a suspected drug distribution conspiracy in December 2001. On January 2, 2003, officers stopped a white BMW containing twenty-two pounds of methamphetamine wrapped in eighteen packages. Walter Cruz DeJesus ("DeJesus") was driving the BMW, and his girlfriend, Jessica Johnson ("Johnson") was the passenger. DeJesus and Johnson were traveling from California to Iowa, and the BMW was registered in the name of DeJesus's mother-in-law. It was discovered that the registration for the BMW had only recently been transferred to DeJesus's mother-in-law and that it previously had been registered in another woman's name. The other woman was the wife of Mendez. DeJesus and Johnson stated that Mendez had enlisted the two of them to drive methamphetamine from California to Iowa and that they had made three to five prior deliveries with loads weighing between fifteen and twenty-five pounds each.

Later, in summer 2004, officers learned from confidential informants that a woman in Des Moines, Kathleen Boatwright ("Boatwright"), was a supplier of methamphetamine. Officers used the confidential informants to make a series of controlled purchases of methamphetamine from Boatwright and her boyfriend, Cody Cannon ("Cannon"), using money with recorded serial numbers. After the

controlled purchases, officers obtained a search warrant for Boatwright's home. Before officers executed the search warrant, one of the confidential informants encountered Boatwright at a store where she was seen purchasing a suitcase and where she told the confidential informant she would be traveling to California. The confidential informant believed the trip to California was for the purpose of obtaining methamphetamine. Officers decided to wait to execute the warrant.

On July 8, 2004, still within the permissible window of time for executing the warrant, the confidential informant told officers that Boatwright had returned from California with a Hispanic male the informant believed to be Boatwright's source. Officers then conducted surveillance of Boatwright's home in preparation for execution of the warrant. Officers observed a Hispanic male on the front porch of Boatwright's home and saw this man and a second Hispanic male leave Boatwright's home in a red Volkswagen Jetta. Officers then stopped the red Jetta and questioned and eventually arrested the two occupants of the car. While officers were processing the men from the Jetta, other officers executed the search warrant at Boatwright's home.

Mendez was the driver of the red Jetta, and defendant Sergio Santamaria ("Santamaria") was the passenger. Mendez told the officers he had a valid driver's license, but proceeded to hand the officers a California identification card bearing the name Anthony Gonzales. Officers saw a California driver's

license in Mendez's wallet. The driver's license, like the identification card, had a picture of Mendez. The driver's license listed the name Felipe Mendez. Santamaria gave the officers an Iowa driver's license that bore his correct name. At the time of the traffic stop, officers were not certain of Mendez's and Santamaria's true identities, so they placed a call to Immigration and Customs Enforcement ("ICE") and obtained consent from Mendez and Santamaria to move them and the Jetta to a nearby police station. A subsequent criminal history check showed prior arrests and deportations for Santamaria in the name of Jaime Cabrera. The car was not registered to either of the men, and both men appeared to be in the United States illegally. Eventually, it was determined that Mendez and Santamaria were present illegally, and ICE entered detainers against them. The officers impounded the Jetta, conducted an inventory search of the Jetta, and searched the two men. The search of the Jetta revealed $4,800 in cash, $740 of which bore serial numbers used in the controlled purchases from Boatwright. It was also discovered that Mendez had three cell phones and Santamaria had two cell phones. Mendez also had the box top from a box of plastic baggies in his pants.

When officers executed the warrant at Boatwright's home, Boatwright, Cannon, and defendant Cesar Daniel Gascon-Guerrero ("Gascon-Guerrero") were present. Gascon-Guerrero was in a bathroom where officers found a small quantity of methamphetamine hidden in a dollar bill behind the toilet

and a cell phone hidden atop a cabinet. A search of the rest of home revealed five ounces of methamphetamine, four grams of marijuana, two digital scales, drug notes, surveillance cameras, two loaded handguns, and ammunition. Officers also found, in the living room of Boatwright's home, a cardboard box of plastic sandwich bags missing a box top that matched the box top found in Mendez's pants.

After agreeing to cooperate, Boatwright testified that she met defendant Isabel Ramon Rodriguez ("Rodriguez") in late 2002 and soon began selling methamphetamine that he supplied. Boatwright believed Rodriguez obtained his methamphetamine from California because she observed on at least one occasion that he traveled to California when he ran out of drugs, and when he returned, he was again able to supply methamphetamine.

In February 2003, Rodriguez was arrested in Des Moines on manslaughter charges. At that time, Boatwright owed Rodriguez money for drugs she had received from him on credit. After Rodriguez's arrest, Boatwright received phone numbers for Mendez and Santamaria through Rodriguez. The number for Santamaria did not work, but the number for Mendez was accurate. Boatwright called Mendez to tell him of the arrest, and Boatwright was present when a man that Rodriguez had brought to Iowa from California used her phone to speak with Mendez. Boatwright then maintained contact with Mendez.

Eventually, Mendez sent Santamaria to Iowa, Santamaria provided methamphetamine to Boatwright, and Boatwright sold the methamphetamine. This continued until Boatwright gambled with the proceeds of her sales and was unable to pay Santamaria and Mendez. The two men cut off Boatwright's supply for awhile, but they eventually resumed their relationship with her. On at least two occasions, Boatwright traveled to California at Mendez's request and returned from California in a black Blazer provided by Mendez. Both times, the Blazer carried methamphetamine, and Mendez sent Gascon-Guerrero with Boatwright to ensure that the methamphetamine reached Des Moines. Both times, Mendez and Santamaria were with Boatwright in California and traveled to Iowa separately from Boatwright and the black Blazer. One of the trips to Iowa was the trip immediately preceding execution of the search warrant at Boatwright's home.

Ultimately, the government brought conspiracy charges against Rodriguez, Mendez, Gascon-Guerrero, Santamaria, and others. These four defendants pleaded not guilty and proceeded to a joint trial. Additional co-conspirators who testified at trial included DeJesus, Johnson, Carlos Gil ("Gil"), Augustin Sandoval Rodriguez, Jeffrey Robert Behle, and Philip Gatewood. These testifying co-conspirators explained their relative roles and contacts within the conspiracy, the frequency and quantity of drugs they had personally handled, the vehicles and locations used by the conspirators, and their observations of

the relationships between the conspirators. We describe testimony from each below as relevant to the various defendants' arguments concerning the sufficiency of the evidence. In general, the witnesses all described the conspiracy in a consistent manner: they placed Mendez at the center with Santamaria also holding a key position. Rodriguez was a lower-level conspirator whose activities were interrupted when he was arrested on manslaughter charges. Finally, Gascon-Guerrero's role, as described by Boatwright, was as that of a trusted shepherd sent by Mendez to ensure that shipments of drugs from California reached Iowa safely.

Mendez has been represented by several different attorneys in relation to this matter. One of his attorneys was F. Montgomery Brown ("Attorney Brown"), who entered an appearance on October 12, 2004. Another attorney entered an appearance to represent Mendez on October 20, 2004. Attorney Brown moved to withdraw from the case, and the court granted his motion on November 2, 2004. At the time of the joint trial of the four present defendants, Attorney Brown was representing Gil, and Gil testified against Mendez over the objection of Mendez's trial counsel. Mendez argues on appeal that the alleged conflict of interest surrounding Attorney Brown's representation of Gil and Mendez in the same matter should have precluded Gil from testifying. In particular, Mendez attacks his own trial counsel's performance alleging trial counsel should have pursued the issue of the possible conflict involving Gil and Attorney Brown

more vigorously. We discuss this issue in more detail below.

Finally, the jury instructions actually given to the jury included a willful blindness instruction that did not reference any one of the four defendants in particular. There were no objections to the use of this instruction. Also, the court did not give the jury a "single vs. multiple" conspiracy instruction, and no party objected at trial to the absence of such an instruction. On appeal, Santamaria challenges the willful blindness instruction and Gascon-Guerrero challenges the absence of a single vs. multiple conspiracy instruction. We address each defendant's various arguments in turn, with additional facts presented as relevant to the arguments.

II. Discussion

A. Santamaria

1. Santamaria: Sufficiency of the Evidence

Santamaria argues the evidence is insufficient to support his conviction. To the contrary, the evidence against him is very substantial. At least four witnesses testified consistently as to Santamaria's actions and role in the conspiracy. This testimony established the elements necessary to prove the conspiracy charges, and the jury accepted this testimony as credible. *See Cannon*, 475 F.3d at 1020 ("To convict . . . of conspiracy, the government had to prove that there was an agreement . . . that [the defendant] knew of this agreement, and that [he] intentionally

joined this agreement.") (citation and internal quotation marks omitted). Further, officers stopped Santamaria leaving Boatwright's home in the red Jetta with the money from the controlled purchases and a multitude of cell phones. To the extent Santamaria bases his sufficiency-of-the-evidence challenge on the jury's assessment of the witnesses' credibility, such determinations are "virtually unreviewable" on appeal, and we will not disturb the jury's assessment in this case. *United States v. Davis*, 471 F.3d 938, 948 (8th Cir. 2006) (quotation marks and internal citation omitted).

The testimony regarding Santamaria was as follows. First, Boatwright testified extensively as to her dealings with Santamaria. She identified Santamaria in court and stated that she knew him as "Rudy." She stated that, after Rodriguez was arrested for manslaughter and after she contacted Mendez, Mendez arranged for her to meet Santamaria at a restaurant in Des Moines. There, she met Santamaria for the first time and gave him money that she had owed to Rodriguez. She also testified that Rodriguez asked Mendez to supply her with methamphetamine to sell. When she talked to Mendez about obtaining drugs for sale, Mendez sent Santamaria to her home with two pounds of methamphetamine. Boatwright also testified that, after she finished selling the methamphetamine that Mendez fronted her through Santamaria, she paid to Santamaria the price quoted by Mendez. Boatwright described this scenario as a repeated event and explained that she

eventually became indebted to Mendez and Santamaria because she gambled away the proceeds of her sales and failed to pay for the fronted methamphetamine. Mendez then summoned her to California where Santamaria met her at the airport, drove her to a hotel, and stayed with her until she met with Mendez. On two separate California trips, she returned to Iowa in a black Blazer accompanied by Gascon-Guerrero. Santamaria, whom she had been with in California prior to driving to Iowa, then arrived in Des Moines. Upon her return to Iowa after one trip, Boatwright met Santamaria at a Des Moines hotel. After the other trip, Santamaria and Mendez came to her home.

Boatwright's testimony places Santamaria in a pivotal role within the conspiracy, helping to coordinate the trafficking and distribution of methamphetamine between California and Iowa, traveling between the two states, and meeting with Boatwright in both states. Cruz, Johnson, and Gatewood also testified against Santamaria, describing a role for Santamaria in the conspiracy that was consistent with Boatwright's testimony. This testimony, combined with the evidence collected from Santamaria and the red Jetta, more than suffices to support the jury's verdict.

2. Santamaria: Willful Blindness Instruction

The court submitted a willful blindness instruction to the jury without specific reference to any one

of the four defendants, and no defendant objected generally or asked that the instruction be limited. Because there was no objection or request to limit the instruction, we review only for plain error. *United States v. Bamberg*, 478 F.3d 934, 939 (8th Cir. 2007). "Plain error only exists if (1) there was an error, (2) the error was plain, (3) the error affected [the defendant's] substantial rights, and (4) a failure to grant relief would seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Falcon*, 477 F.3d 573, 577 (8th Cir. 2007) (citation and internal quotation marks omitted).

The willful blindness instruction in this case was appropriate because one of Santamaria's co-defendants, Gascon-Guerrero, claimed ignorance of the conspiracy. As explained below, however, the evidence strongly demonstrated that Gascon-Guerrero would have to have been deliberately ignorant not to appreciate the existence and activities of the conspiracy. *See United States v. Florez*, 368 F.3d 1042, 1044 (8th Cir. 2004) ("A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance.") (citation and internal quotation marks omitted). Further, the government did not argue at closing that willful blindness was applicable to Santamaria. Where a willful blindness instruction is appropriate as to at least one of multiple co-defendants, we do not believe that a trial court's failure to *sua sponte* limit the willful-blindness instruction to a particular defendant

generally rises to the level of plain error. Further, even if we found error on the present facts, we would not find that any such error affected Santamaria's substantial rights given the overwhelming evidence of his guilt. *See United States v. Noske,* 117 F.3d 1053, 1059 (8th Cir. 1997) (finding no prejudice to a defendant in the giving of a willful blindness instruction where the instruction was appropriate as to another defendant, there was no request to limit the instruction, and the evidence against the defendant was "overwhelming").

3. Santamaria: Sentence Enhancement/ Predicate Felonies

The district court found that Santamaria had two prior felony drug convictions and sentenced Santamaria to life imprisonment in accordance with 21 U.S.C. §§ 841(b)(1)(A) and 851. The two prior felony drug convictions were a 1991 conviction in San Jose, California, for felony possession of marijuana with intent to sell, and a 1999 conviction in Los Angeles for possession of cocaine base with intent to sell. Santamaria argues that certified records used to prove these prior convictions fail to show (1) that he was represented by, or waived his right to, counsel in relation to the 1991 conviction, or (2) that the 1999 conviction which resulted in probation rather than imprisonment was, in fact, a "final" conviction as required under 21 U.S.C. § 841(b)(1)(A).

As to the first argument, 21 U.S.C. § 851(e) places a five-year limitation on a defendant's ability to collaterally challenge a prior conviction that the government seeks to use for a federal sentencing enhancement. *Id.* ("No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction."). This five-year limitation, however, does not apply to claims that a defendant's predicate conviction occurred in violation of the defendant's right to counsel. *Custis v. United States,* 511 U.S. 485, 494-96 (1994). Accordingly, even though the 1991 conviction was more than five years old, Santamaria is not time-barred from proving it infirm for use as predicate felony.[2]

Santamaria's challenge fails, instead, because he did not meet his burden of proof. Congress clearly provided that a defendant may challenge a prior conviction as "obtained in violation of the Constitution of the United States," but Congress chose to place on the defendant rather than the government "the burden of proof by a preponderance of the evidence on any issue of fact raised [in the challenge]." 21 U.S.C. § 851(c)(2). Santamaria was careful below,

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[2] As to the 1999 conviction, Santamaria does not present a collateral challenge. Rather, he contests the very existence of a qualifying final conviction. Accordingly, the five year limitation does not apply.

in his appellate brief, and in oral argument to this panel, to avoid actually claiming that he was deprived of counsel in 1991. Rather, he argues only that the certified record of his conviction fails to show that he was represented by counsel or that he waived his right to counsel. In fact, his argument on this issue in his brief concludes, "*If* Santamaria was not represented by counsel for the subject offense, the offense cannot be used to trigger the mandatory life sentence." (Emphasis added). Santamaria's reluctance to actually claim there was an absence of counsel in 1991 strongly suggests that this argument amounts to form over substance. In any event, a complete failure to allege the absence of counsel falls far short of meeting the factual burden of proof imposed on Santamaria by § 851(c)(2).

As to the 1999 conviction, Santamaria argues there was no final judgment under state law because he received probation and a suspended sentence. As a result, he argues, there was no "prior conviction[] for a felony drug offense." 21 U.S.C. § 841(b)(1)(A). The facts surrounding the California proceedings were as follows. Santamaria pleaded guilty to the California cocaine charge on June 14, 1999, and was sentenced to thirty-six months of probation and ninety days of imprisonment. On October 10, 2001, his probation was modified and he was ordered to complete 80 hours of community service. On July 10, 2002, his probation was revoked, and on July 14, 2002, he was arrested on a bench warrant and ordered to attend an anger management meeting. On August 26, 2002, the

court reinstated his probation. Based on these facts, we believe that Santamaria's 1999 guilty plea and subsequent proceedings in California qualify as a final conviction under § 841(b)(1)(A). *See United States v. Slicer,* 361 F.3d 1085, 1086-87 (8th Cir. 2004) (applying federal law to find that probation and a state's suspended imposition of sentence qualified as a final conviction under § 841(b)(1)(A)); *United States v. Maxon,* 339 F.3d 656, 658-59 (8th Cir. 2003) (applying federal law to determine whether there was a qualifying predicate); *United States v. Franklin,* 250 F.3d 653, 665 (8th Cir. 2001) (same); *United States v. Ortega,* 150 F.3d 937, 948 (8th Cir. 1998) (stating that federal rather than state law determines whether a prior proceeding resulted in a qualifying predicate under § 841(b)(1)(A)).

In a separate challenge also related to sentencing, Santamaria argues that the district court impermissibly looked beyond the statutory elements of his prior convictions to determine that the underlying crimes were "felony drug offense[s]." 21 U.S.C. § 841(b)(1)(A). This argument is without merit. Here, the information necessary to determine the nature of the predicate offenses was contained in the certified records of the convictions. Under *Shepard v. United States,* 544 U.S. 13 (2005), a sentencing court is not constrained to look only at the statutory elements of the offense, but may look to the "terms of the charging document, the terms of a plea agreement or transcript of colloquy between the judge and defendant . . . or to some comparable judicial record of this

information." *Id.* at 26. The district court in this case simply undertook no impermissible inquiries in the course of determining that Santamaria's prior convictions for possessing marijuana with the intent to sell and possessing cocaine base with the intent to sell were qualifying prior "felony drug offense[s]." 21 U.S.C. § 841(b)(1)(A).

B. Gascon-Guerrero

1. Gascon-Guerrero: Sufficiency of the Evidence

Gascon-Guerrero challenges the sufficiency of the evidence to support his conviction. In particular, he argues that the evidence proved merely that he was present, not that he had knowledge of, or participated in, a conspiracy. His arguments are without merit.

Gascon-Guerrero was arrested when found in the bathroom of Boatwright's residence during the officers' execution of the search warrant. Hidden with him in the bathroom were a cell phone and small quantity of methamphetamine wrapped in a dollar bill. Boatwright testified that Mendez sent Gascon-Guerrero along to accompany her on two separate trips from California to Iowa to make sure she and the drugs that were hidden in the Blazer arrived safely. Upon arriving in Iowa on the first trip, Gascon-Guerrero waited with Boatwright until instructed to meet with Santamaria at a Des Moines-area motel. He then took the Blazer and Boatwright to the motel to meet with Santamaria. Later, he drove the Blazer

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and Boatwright back to Boatwright's residence, left again with the Blazer, and returned a short time later with two pounds of methamphetamine for Boatwright to sell. Following the second California-to-Iowa trip that Gascon-Guerrero took with Boatwright, Mendez and Santamaria took the Blazer from Boatwright's home while Boatwright and Gascon-Guerrero waited. Mendez and Santamaria returned shortly thereafter with ¼ pound of high purity "ice" methamphetamine and ¼ pound of lower purity Mexican methamphetamine.

The nature of Gascon-Guerrero's actions, as described by Boatwright and as corroborated by Gascon-Guerrero's presence at the residence with the hidden phone and methamphetamine when officers executed sexecuted the search warrant, provide sufficient support for the jury's determination.

2. Gascon-Guerrero: Multiple Conspiracy/ Single Conspiracy Instruction

Gascon-Guerrero challenges the district court's failure to offer a "single conspiracy vs. multiple conspiracy" jury instruction. Gascon-Guerrero neither requested such an instruction nor objected to its absence, so our review is for plain error. *Bamberg*, 478 F.3d at 939. Here, there was no error in the absence of such an instruction.

We have said that:

> A single conspiracy is composed of individuals sharing common purposes or objectives

> under one general agreement. A single conspiracy may exist even if the participants and their activities change over time, and even if many participants are unaware of, or uninvolved in, some of the transactions. Further, the agreement need not be explicit, but may be tacit, based upon the actions of the defendant.

United States v. Smith, 450 F.3d 856, 860 (8th Cir. 2006) (internal citations and quotation marks omitted). The government's theory of the case was that Mendez and Santamaria were at the center of a single, "wheel and spoke" conspiracy to distribute methamphetamine with the other co-conspirators involved to varying degrees in different aspects of the transportation, delivery, and sale of the drugs. The evidence presented against Gascon-Guerrero consistently described a conspiracy to deliver and distribute methamphetamine from California to the Des Moines area. In *United States v. Cubillos*, 474 F.3d 1114, 1118 (8th Cir. 2007), we stated that to determine whether there is one or more conspiracies, "we consider factors such as 'the nature of the activities, the location where the alleged events of the conspiracy occurred, the identity of the co-conspirators, and the time frame.'" *Id.* (quoting *United States v. Burns*, 432 F.3d 856, 863 (8th Cir. 2005)). Here, there were no allegations of a separate conspiracy with a separate purpose, separate activities, or separate locations, and the evidence supported the government's single conspiracy theory. It is not necessary that all co-conspirators know one another or collaborate with

every other member of a conspiracy for there to be a single conspiracy. *See United States v. Oseby*, 148 F.3d 1016, 1024 (8th Cir. 1998) ("'[I]t is not necessary to show that all the conspirators were involved in each transaction or that all the conspirators even knew each other.'") (quoting *United States v. Rosnow*, 977 F.2d 399, 405 (8th Cir. 1992)).

3. Gascon-Guerrero: Ineffective Assistance of Counsel

Gascon-Guerrero's trial counsel decided not to cross-examine Boatwright, and Gascon-Guerrero alleges ineffective assistance of counsel based on this decision. We note initially that defense counsel for the other defendants cross-examined Boatwright and brought issues relevant to her credibility to light for the jury. Gascon-Guerrero does not suggest that cross-examination by the other attorneys was flawed or ineffective or that there were additional areas of inquiry his own counsel could have or should have pursued. Gascon-Guerrero also does not explain how he was differently situated from the other defendants for the purpose of attacking Boatwright's credibility in a manner that would have been unique to Gascon-Guerrero's case. That having been said, a claim of ineffective assistance is not generally cognizable on direct appeal unless the record relevant to the claim of ineffectiveness is fully developed "or where the result would otherwise be a plain miscarriage of justice." *United States v. Lewis*, 483 F.3d 871, 873 n.2 (8th Cir. 2007) (internal quotation marks and citation

omitted). No record has been developed in this case to explain how the alleged ineffectiveness might have caused prejudice to Gascon-Guerrero, we find no risk of a miscarriage of justice, and Gascon-Guerrero largely appears to have raised this issue to ensure its preservation for a collateral attack. As such, we will not address this issue further.

4. Gascon-Guerrero: Drug Quantity Determination

The district court found Gascon-Guerrero responsible for at least fifteen kilograms (slightly over thirty-three pounds) of methamphetamine and sentenced him to 200 months' imprisonment to be followed by 60 months of supervised release. As a conspirator, Gascon-Guerrero is responsible for the quantity of drugs involved in the conspiracy that was reasonably foreseeable in light of his agreement to participate in the conspiracy:

> In order to attribute a quantity of drugs to a defendant, the sentencing court is required to find by a preponderance of the evidence that the activity involving those drugs was in furtherance of the conspiracy and either known to that defendant or reasonably foreseeable to him. In a drug conspiracy case, the district court may consider amounts from drug transactions in which the defendant was not directly involved if those dealings were part of the same course of conduct or scheme.

United States v. Rodriguez, 484 F.3d 1006, 1014 (8th Cir. 2007) (quotation marks and internal citations omitted). Given this rule, it matters not that only a small quantity of methamphetamine was found with Gascon-Guerrero in the bathroom when officers executed the search warrant.

Gascon-Guerrero was well positioned within the conspiracy to appreciate the scope of the conspiracy and the quantities involved. He was shown to be a trusted shepherd who could be relied upon to ensure other conspirators made it securely to their destinations. He was neither a one-time mule nor an ignorant patsy. Regarding activities directly involving Gascon-Guerrero, there were repeated trips between California and Iowa with Boatwright. In Iowa, Gascon-Guerrero left Boatwright's residence with Santamaria in the Blazer and returned with drugs. It is reasonable to presume, as Boatwright presumed, that Gascon-Guerrero and Santamaria extracted the drugs from their hiding place in the Blazer. These actions demonstrate a position within the conspiracy with adequate exposure to information about the conspiracy to make more than Gascon-Guerrero's own activities reasonably foreseeable to Gascon-Guerrero.

Other co-conspirators, including Cruz and Johnson, testified consistently as to the quantities involved in their own cross-country trips (fifteen to twenty-five pounds per trip for five trips). In addition, Jeff Behle and Philip Gatewood were testifying co-conspirators who claimed to have been involved with the breaking-down of vehicles and extraction of drugs

from transport vehicles. These co-conspirators testified consistently as to repeated shipments in the same weight range. Although much of this testimony described shipments in a time frame preceding the evidence of Gascon-Guerrero's involvement, the testimony clearly demonstrates shipment size and transportation techniques consistent with Boatwright's testimony. The witnesses' testimony, taken together, is adequate to show that the conspiracy involved at least fifteen kilograms and that this quantity was reasonably foreseeable to Gascon-Guerrero.

C. Rodriguez

Rodriguez argues only that the evidence was insufficient to support his conviction. For the reasons explained above, including Boatwright's testimony regarding Rodriguez's role in the conspiracy and his role in introducing her to Mendez and facilitating her receipt of drugs from Mendez and Santamaria, his arguments are without merit. The evidence was more than sufficient to support the jury's verdict as to Rodriguez.

D. Mendez

1. Mendez: Reasonableness of the *Terry* Stop/Seizure

Mendez first challenges the officers' stop of the red Jetta. Mendez argues the stop was based solely on race and, as such, was unreasonable and in

violation of his Fourth Amendment protections against an unreasonable seizure.[3]

Regarding the initial stop, we find that there was reasonable suspicion for an investigatory stop as required under *Terry v. Ohio*, 392 U.S. 1, 30 (1968). *See United States v. Bell*, 480 F.3d 860, 863 (8th Cir. 2007) (applying the *Terry* standard of reasonable suspicion to an investigatory traffic stop where the officer possessed information from a reliable informant's tip and where a detective had verified portions of the tip through surveillance prior to the stop). In claiming that the stop was based solely on race, Mendez mischaracterizes the scope of the information underlying the officers' reasonable suspicion. Officers possessed all the information that supported the issuance of the search warrant for Boatwright's residence, including the repeated controlled purchases, Boatwright's purchase of luggage and round-trip travel to California, and the claim by the confidential informant that Boatwright had returned from California with a Hispanic male believed to be her supplier. Armed with this information, officers

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[3] Mendez appears to challenge only the initial, investigatory stop, not the expansion or duration of the stop. In fact, any such challenge would be wholly without merit because suspicion of criminal activity grew rapidly from the initial stop and because Mendez consented to the officer's request to move the investigation to a police station. *See United States v. Gomez Serena*, 368 F.3d 1037, 1041 (8th Cir. 2004) (holding that the expansion or extension of stop may be permissible if supported by developing or expanding level of suspicion).

surveilled Boatwright's home, observed a Hispanic male on the front porch, and observed that man and another Hispanic male leave the residence in the red Jetta. Based on the totality of this information, it cannot be said that officers stopped the red Jetta merely because a Hispanic person was present, nor can it be said that the officers lacked reasonable suspicion. Although race was an identifying characteristic actually used by the officers, it was not the only factor officers relied upon, and the present case is not an example of racial profiling, as suggested by Mendez. *See United States v. Thomas,* 480 F.3d 878, 882 (8th Cir. 2007).

2. Conflict of Interest Regarding Attorney Brown

When the government offered Gil as a witness and commenced direct examination, Mendez's actual trial counsel, Timothy McCarthy ("Attorney McCarthy"), objected at a sidebar. Attorney McCarthy challenged the use of Gil as a witness, alleging that Attorney Brown's temporary, pre-trial representation of Mendez, coupled with Attorney Brown's representation of Gil, created a conflict of interest. The court determined during the sidebar that Gil could testify, subject to possible exclusion, and that a record would be made after-the-fact to address the possible conflict.

In direct testimony and on cross-examination, Gil explained that he pleaded guilty to conspiracy to distribute methamphetamine without a written plea

agreement. He had been sentenced to the statutory minimum for his offenses, 120 months' imprisonment, and was already serving his sentence by the time of Mendez's trial. Gil testified that he met Mendez in a Des Moines-area bar, began receiving one to two pound packages of methamphetamine from Mendez, always met with Mendez on the east side of Des Moines, saw Mendez in a black Mercedes but in no other vehicles, and received the methamphetamine on credit with money due to Mendez after resale of the drugs. Gil testified that he sold methamphetamine from Mendez for a three to four month period after Christmas 2003.

When Gil was done testifying and the jury was excused for a break, Attorney McCarthy was given the opportunity to question Gil. Attorney McCarthy quickly focused on the interaction between Attorney Brown and Gil and asked Gil if he was willing to waive his attorney-client privilege and discuss information exchanged with Attorney Brown. Attorney McCarthy explained to the district court that the potential for prejudice to Mendez in this situation was the possibility that Attorney Brown had obtained privileged, damaging information from Mendez and subsequently breached his duty of confidentiality towards Mendez by sharing that information with Gil for use in Gil's testimony against Mendez. Attorney McCarthy, the prosecutors, and the district court agreed that any further questioning along these lines and any waiver of privilege by Gil could not take place without the presence of Attorney Brown and

without giving Gil the opportunity to discuss the possible waiver with Attorney Brown. As a result, the district court decided to halt the offer of proof related to Gil and resume at a later date when Attorney Brown could be made to appear.

At the appointed date and time, when the court asked Attorney McCarthy if he wished to resume questioning Gil outside of the presence of the jury, the following exchange took place:

> THE COURT: Mr. McCarthy, my understanding was you didn't need to make any record with respect to either Mr. Brown or Mr. Gil, is that correct?
>
> MR. McCARTHY: That is correct, Your Honor. I'm going to let the Carlos Gil issue go at this time.

Later, in a motion for new trial, Mendez argued that Attorney McCarthy provided ineffective assistance by failing to make a proper record regarding the possible conflict involving Attorney Brown's representation of Mendez and Gil. Mendez argued that Attorney Brown's dual representation presented an actual conflict of interest and required relief without a need to show prejudice. The district court rejected Mendez's arguments, finding that it was necessary to prove prejudice under *Strickland v. Washington*, 466 U.S. 668, 692 (1984), and that the presumed prejudice rule of *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980) (holding that a showing of *Strickland*-type prejudice is not required where a

defendant demonstrates an actual conflict that adversely affected counsel's performance), did not apply because there was no actual conflict of interest. The district court's finding was based on the fact that Mendez's own trial counsel, Attorney McCarthy, was not alleged to have labored under any sort of conflict. Rather, the conflict related to Attorney Brown. Because the presumed prejudice standard did not apply, relief was contingent upon a showing of prejudice. As to the issue of prejudice, the district court ultimately concluded, "[a]s shown by the . . . evidence . . . even if the Court disallowed Gil's testimony, there is no reasonable probability the jury verdict would have been different in this case."

On appeal, Mendez renews his conflict of interest argument, placing it in the context of an ineffective assistance argument directed towards Attorney McCarthy. Although, we generally do not address such claims on direct appeal, *Lewis*, 483 F.3d at 873 n.2, we find no further development of the record is necessary in this case to resolve Mendez's claim of ineffective assistance. Accordingly, we will address this claim now, on direct appeal. In doing so, we affirm for the same reasons as the district court, namely: (1) there was no actual conflict; (2) a showing of prejudice is therefore necessary for any grant of relief; and (3) there was no prejudice in this case because the evidence against Mendez was overwhelming and Gil was, at most, a minor witness whose testimony was cumulative with that of more important witnesses.

There was no actual conflict in this case because Mendez received conflict-free assistance from Attorney McCarthy. Mendez cites no authority, and we have found none, in which the presumed prejudice rule of *Cuyler* is extended to a situation involving a defendant's prior attorney in the absence of any alleged conflict involving actual trial counsel. There is, however, authority from another circuit that is analogous to the present situation and that strongly suggests a showing of prejudice is required in Mendez's case. In *English v. United States,* 620 F.2d 150, 151-52 (7th Cir. 1980), the Seventh Circuit gave short shrift to an argument similar to Mendez's. There, a defendant initially was represented by two attorneys, counsel and co-counsel. Co-counsel ceased the representation and began representation of a co-defendant. The defendant claimed a conflict based on the fact that co-counsel, who had actually represented him in the same proceedings, switched and served the co-defendant. The Seventh Circuit summarily dismissed the claim, finding that because the defendant received conflict-free assistance from his own, actual trial counsel, any actions taken by former co-counsel could not create a conflict. *See id.* at 151 ("English after all is not impugning the effectiveness of his own counsel . . . but his former counsel. . . .").

This is not a case like *Simmons v. Lockhart,* 915 F.2d 372 (8th Cir. 1990), in which our court found an actual conflict and applied the *Cuyler* standard to examine whether there was "an actual and demonstrable effect of the conflict . . . not merely an abstract

or theoretical one." *Simmons*, 915 F.2d at 378. In *Simmons*, a defendant's actual trial counsel had previously represented one of the prosecution's witnesses. There, we stated that the actual conflict "fairly leaps off the page." *Id.* at 377. We held, however, that it remained necessary to show "how [the] defense [was] hurt by the fact that one of his trial lawyers had previously represented the witness [involved in the alleged conflict.]" *Id.* at 378. We carefully reviewed the record of the trial and determined that the attorney who labored under an actual conflict had made no tactical decisions nor performed in any manner that suggested the conflict impaired the defense. *Id.*

The present case, in contrast, involves absolutely no showing or suggestion of a conflict on the part of the one attorney who actually represented Mendez at trial and made all tactical decisions for Mendez at trial. As such, we conclude that the presumed prejudice standard of *Cuyler* has no application to the present facts. Rather, the traditional prejudice inquiry of *Strickland* applies, and it is necessary for Mendez to "demonstrate a reasonable probability" that the outcome of the proceedings would have been different absent some ineffectiveness on the part of Attorney McCarthy. *Strickland*, 466 U.S. at 694.

Here, as Mendez has consistently asserted to the district court and to our court, the possibility of prejudice lies in the abstract possibility that Attorney Brown might have obtained damaging privileged information from Mendez and the further abstract

possibility that Attorney Brown might have passed this information on to Gil. Mendez argues Attorney McCarthy provided ineffective assistance by ceasing his pursuit of this issue and that Attorney McCarthy's ineffectiveness caused prejudice. We disagree. We find that it was well within the bounds of professional judgment and discretion for Attorney McCarthy to elect to stop his pursuit of this abstract chain of potential prejudice, and as such, we find no ineffectiveness on McCarthy's part. The evidence against Mendez was overwhelming: six cooperating co-conspirators other than Gil testified consistently as to Mendez's role at the heart of the conspiracy. Four inmates who had been confined with Mendez testified as to statements Mendez made about his involvement with methamphetamine trafficking. In addition, Mendez was stopped leaving Boatwright's home shortly before execution of the search warrant, and he was in the car that carried money used in the controlled buy. Further, he carried in his pocket the box top from a box of baggies that was found in the Boatwright residence with other drug paraphernalia. Finally, Mendez himself testified and made many statements that a reasonable jury could disbelieve and which could permit the jury to conclude Mendez was dissembling to cover his guilt. Given this state of the record, we believe that Mendez has not satisfied either element of the *Strickland* test. Not only did Mendez fail to show a level of prejudice that could satisfy the "reasonable probability" standard of *Strickland,* he failed to show that Attorney McCarthy

performed in a deficient manner when deciding to let the conflict issue go and cease his questioning of Gil.

3. Denial of the Motion for a New Trial

Mendez's motion for a new trial was based on his arguments concerning the *Terry* stop and the alleged conflict. Given our resolution of these issues, we find no error in the district court's denial of the motion for a new trial.

For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-1339

United States of America,

Appellee

v.

Felipe Mendez, Jr.,

Appellant

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:04-cr-199 RP)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 05, 2007

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	*
	* 4:04-cr-199
	*
Plaintiff,	* MEMORANDUM AND
	* ORDER ON DEFEN-
v.	* DANT'S MOTION TO
FELIPE MENDEZ, JR.,	* SUPPRESS EVIDENCE
Defendant.	*

Before the Court is a Motion to Suppress Evidence filed by the Defendant, Felipe Mendez, Jr., on August 9, 2004. Clerk's No. 35. Also filed on the Defendant's behalf are a Supplemental Motion to Suppress and an Amended Motion to Suppress. Clerk's Nos. 76 and 88. On August 10, 2004 a Grand Jury, convened in the Southern District of Iowa, delivered a one-count Indictment as to this Defendant charging him with Conspiracy to Distribute Methamphetamine under 21 U.S.C. sections 846 and 841(b)(1)(A). Clerk's No. 1. Subsequently, on September 15, 2004, the Government filed a Superseding Indictment reflecting a change in the alleged starting date of the conspiracy. Clerk's No. 41.

The Government filed a timely Resistance to Defendant's motion (Clerk's No. 42) and Memorandum in Support. Clerk's No. 78. At hearing on December 14, 2004, the Court received into evidence the Application for a Search Warrant and the testimony of Steven DeJoode, Special Agent with the Iowa

Department of Safety, Division of Narcotics and Enforcement ("Agent DeJoode"). The matter is fully submitted.

I. BACKGROUND

> Mr. Parrish: "Well, following up on my question, do you believe that based on your investigation that you had reasonable suspicion to stop any Hispanic male you saw leaving the residence?"
>
> Agent DeJoode: "Yes. Another Hispanic male hypothetically would have departed the residence, I would have taken the same actions."

Hr'g Tr. at 57.[1]

On July 2, 2004, Agent DeJoode applied for and obtained a search warrant, in Iowa state court, for a residence shared by Kathleen Boatwright ("Boatwright") and Cody John Cannon ("Cannon"), alleged co-conspirators with the Defendant. Hr'g. Tr. at 8-9; Superseding Indictment. Agent DeJoode had begun an investigation of Boatwright and Cannon on or about June 9, 2004. Hr'g Tr. at 9, 35; Warrant App. at 6. At the time, Agent DeJoode met with a cooperating individual ("CI-1"), who informed Agent DeJoode that methamphetamine could be purchased from Boatwright. Hr'g Tr. at 35. On June 22, 2004, and then

[1] The hearing citations refer to the Court's Real Time unedited transcript.

again on June 30, 2004 Agent DeJoode orchestrated methamphetamine purchases from Boatwright and Cannon in proximity to their residence ("Residence"). *Id.* at 9, 35-36; Warrant Aff. at 6. During his investigation, Agent DeJoode conducted surveillance by driving by the Residence in order to obtain license plate numbers of visitors at the Residence. Hr'g Tr. at 9. CI-1 told Agent DeJoode that Boatwright had a "Hispanic methamphetamine source from California," and that Boatwright often made trips to California to procure methamphetamine. *Id.* at 35. CI-1 also told Agent DeJoode that Boatwright would fly to California and return to Iowa with her "source" in two separate vehicles. *Id.* During Agent DeJoode's regular surveillance of the Residence prior to July 8, 2004, he observed no Hispanic males in the area around the Residence. *Id.* at 56.

On July 1, 2004, a second cooperating individual ("CI-2") informed Agent DeJoode that methamphetamine could also be purchased from Cannon. *Id.* at 37; Warrant Aff. at 7. On the same date, Cannon met with CI-2 to sell methamphetamine and lamented about only being able to deliver one quarter ounce of methamphetamine instead of the agreed upon amount of one ounce. *Id.*; Warrant Aff. at 7. Cannon then informed CI-2 that more methamphetamine would soon be available because "he would be receiving a large shipment of methamphetamine from a Hispanic male from California." Hr'g Tr. at 37. Later on July 1, 2004, CI-1 told Agent DeJoode that Boatwright had purchased a suitcase and told CI-1 she

would be making another trip to California. *Id.* at 37-38. On July 2, 2004, Agent DeJoode obtained the search warrant. *Id.* at 38. The search warrant affidavit contained no mention of the Defendant, the passenger in the car the Defendant was driving, or any reference to Hispanic males. *Id.* at 12. The affidavit likewise contained no description of the vehicle the Defendant was driving, a red Volkswagen Jetta. *Id.*

On July 8, 2004, CI-1 told Agent Dejoode that Boatwright had returned to Des Moines. *Id.* at 38. In addition, on that same day, CI-1 told Agent DeJoode "that there was a Hispanic male at the house who the informant believed was the California source of the methamphetamine." *Id.* at 39. Later on July 8, under DeJoode's direction, CI-1 telephoned Boatwright and, in a recorded conversation, asked whether Boatwright had any methamphetamine. *Id.* Boatwright informed CI-1 that she did and agreed to meet with CI-1 for the purpose of selling the methamphetamine. *Id.* On July 8, 2004, Agent DeJoode, along with two other law enforcement personnel, Detective Sean Wissing ("Det. Wissing") and Detective Curtis Pote ("Det. Pote") decided to execute the search warrant on the Residence at 5:05 p.m. *Id.* at 15.

As they approached the Residence at around 3:45 p.m., Det. Wissing noticed a red Volkswagen Jetta ("Jetta") in the driveway of the Residence. *Id.* at 15-16. As he drove by the front of the Residence, Agent DeJoode also noticed a Hispanic male sitting on the porch. *Id.* at 40. A short while later, Detective Wissing observed two Hispanic males get into the Jetta and

drive away. *Id.* at 16-17, 41. As to the Jetta or the two persons inside, Detective Wissing observed no illegal or suspicious activity. *Id.* at 17. Agent Dejoode, along with Det. Wissing and Det. Pote, each in separate unmarked cars, followed the Jetta. *Id.* The law enforcement officers followed the Jetta for several city blocks. *Id.* at 18. They observed that the driver of the Jetta did not violate any traffic laws. *Id.* Agent DeJoode had no reason to believe the two occupants of the Jetta knew about the impending execution of the search warrant and, thus, no reason to believe they were running from law enforcement. *Id.* Notwithstanding the lack of any observable traffic violation or other illegal activity, Agent DeJoode decided to stop the Jetta at approximately 3:50 p.m. *Id.* at 18-19, 41. Agent DeJoode believed reasonable suspicion existed based on "previous information that [a] Hispanic male from California was involved." *Id.* at 41; *see also id.* at 57 (Agent DeJoode believed reasonable suspicion existed to justify the seizure of *any* Hispanic male leaving the Residence on July 8 or anytime thereafter) (see quote *supra*).

Once stopped, Agent DeJoode approached the Jetta and asked for identification. *Id.* at 20. The Defendant, who was driving, produced a California identification card with the Defendant's picture and the name "Anthony Gonzales." *Id.* at 21, 42. The Defendant told Agent DeJoode the identification card belonged to his brother and then produced a California driver's license. *Id.* at 21, 42-43. The driver's license also contained a photograph of the Defendant,

but with the name "Felipe Mendez." *Id.* at 43. The Jetta, with valid registration plates, was registered to two Des Moines residents. *Id.* The Defendant asked Agent DeJoode what was happening and Agent DeJoode responded by informing the Defendant he was conducting an investigation. *Id.* at 26. After some questioning, the Defendant told Agent DeJoode he had just left Cannon's Residence and that he had arrived in Des Moines the previous day, July 7, 2004. *Id.* at 44. A criminal history and social security background check revealed that the Defendant had a significant criminal history in California and that the social security number on the Defendant's identification documents had last been issued prior to the Defendant's date of birth. *Id.* At that point, Agent DeJoode decided to enlist the help of the Bureau of Immigration and Customs Enforcement ("BICE"). *Id.* at 47.

The record is not entirely clear, but Agent DeJoode also searched the Defendant at some time during the stop. *Id.* at 21. The search produced $2,273 in cash and three cellular phones. *Id.* Agent DeJoode documented the phone information saved on each of the phones, e.g., phone book information, outgoing call numbers, incoming call numbers, etc. *Id.* at 22. Also seized was the Defendant's wallet containing photographs, identifications, credit bank cards, and notes. *Id.* at 22-23.

At some time during the stop, Agent DeJoode asked the Defendant to join him in Agent DeJoode's car. *Id.* at 26. Agent DeJoode asked the Defendant

whether he would be willing to travel to a different location to conduct the investigation further with the assistance of an interpreter. Agent DeJoode also asked for the Defendant's consent to move the Jetta by allowing one of the officers to drive it, in order to avoid it being towed away. *Id.* at 31, 48-49. With or without the Defendant's consent, Agent DeJoode intended to conduct the investigation at the nearby Iowa State Patrol District One Headquarters in Des Moines ("State Patrol Headquarters"), because Agent DeJoode believed there was sufficient probable cause to justify an arrest for the possession of fraudulent documents. *Id.* at 32-33, 50-51. At approximately 4:20 p.m., Agent DeJoode and other officers arrived at the State Patrol Headquarters with the Defendant, his passenger, and the Jetta. *Id.* at 30. The Defendant was eventually arrested for carrying fraudulent documents. *Id.* at 31. The Defendant and passenger were then taken to the BICE office in the Des Moines federal building and, after an investigation, a federal detainer was lodged against the Defendant and the passenger. *Id.* at 53. The Defendant admitted to immigration officials that he was in the country illegally. *Id.* Subsequently, the Defendant was charged under Iowa law for distribution of methamphetamine. *Id.*

The Jetta was inventoried. *Id.* at 24, 54-55. A search of the Jetta produced two duffle bags containing men's clothing and toiletries. *Id.* at 24. One of the bags also contained $4,800 cash, $740 of which matched preserialized currency used by Agent DeJoode in two

prior methamphetamine transactions. *Id.* at 24-25. Agent DeJoode also discovered two black suitcases, one large and one small, and another yellow duffel bag. *Id.* at 25.

II. ANALYSIS

A. *The Automobile Stop*

Through his original motion to suppress and his supplemental motion to suppress, the Defendant argues that the Government agents had no reasonable basis for stopping the Jetta. Of course, if the stop was unreasonable, as Defendant contends, then the subsequent pat-down of the Defendant, search of the automobile, and arrest would necessarily be invalidated.

"An automobile stop is subject to the Fourth Amendment imperative that the stop must be reasonable." *See United States v. Ramos-Caraballo,* 375 F.3d 797, 800 (8th Cir. 2004) (citing *Whren v. United States,* 517 U.S. 806, 810 (1996)). "A vehicle stop is reasonable if it is supported by either probable cause to believe that a traffic violation has occurred, or an articulable and reasonable suspicion that criminal activity is afoot." *See Ramos-Caraballo,* 375 F.3d at 800-801 (citing *Delaware v. Prouse,* 440 U.S. 648, 663 (1979)). "A stop is permissible only when officers are aware of facts which, taken together with rational inferences from these facts, reasonably warrant the suspicion that the person stopped has been, is, or is

about to be engaged in criminal activity." *United States v. Rose*, 731 F.2d 1337, 1342 (8th Cir. 1984).

Although, the investigation into whether reasonable suspicion exists "requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *See Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000) (stating that an "officer must be able to articulate more than an 'inchoate and unparticularized suspicion or hunch of criminal activity'") (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)); *see also United States v. Lebrun*, 261 F.3d 731, 733 (8th Cir. 2001) (considering significant that a court consider the "view [of] the totality of the circumstances through the perspective of an experienced law enforcement officer trained in crime detection and acquainted with the behavior of criminals"). "'The relevant inquiry' concerning the inferences and conclusions a court draws [in making a reasonable suspicion determination] 'is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts.'" *See Wardlow*, 528 U.S. at 128 (citing *United States v. Sokolow*, 490 U.S. 1, 10 (1989)) (Stevens, J., concurring in part and dissenting in part).

The Government concedes that no probable cause existed based on a traffic violation, and that no probable cause existed under the search warrant, to stop the Defendant. Instead, the Government contends reasonable suspicion existed to believe the persons in the Jetta were involved in criminal activity. Over the

course of questioning at hearing, Agent DeJoode articulated six factors to support a reasonable suspicion that the Defendant was connected to criminal activity, thereby justifying the traffic stop: 1) Boatwright purchased drugs from a Hispanic source in California; 2) the Hispanic source regularly traveled back to Iowa with Boatwright after those purchases; 3) Boatwright had just returned from California after a drug purchase; 4) a month-long surveillance revealed no other Hispanic persons in the vicinity of the Residence over that time period; 5) at least one Hispanic male was in the Residence the day after Boatwright returned from California; and 6) Agent DeJoode believed that person was, in fact, Boatwright's Hispanic methamphetamine source from California.

At first impression, it appears the specter of racial profiling casts its shadow over most of the information articulated by Agent DeJoode. If race were the only factor at play in deciding whether to stop the Jetta, then this analysis would proceed no further. *See United States v. Weaver*, 966 F.2d 391, 394 n.2 (8th Cir. 1992) (agreeing with the dissent "that large groups of our citizens should not be presumptively criminal based upon their race"). In *Weaver*, the race of two Los Angeles gangs known to be flooding the Kansas City area with cocaine was deemed a legitimate factor in deciding whether to stop and interrogate a traveler at the airport. *See id.* (stating that, given the other facts taken into account with the defendant's race, the "facts are not to be

ignored simply because they may be unpleasant – and the unpleasant fact in this case is that [the officer] has knowledge, based upon his own experience and the intelligence of others that young male member of black Los Angeles gangs were flooding the Kansas City area with cocaine"). A view to the totality of the circumstances, in this case, reflects that the Defendant's race was one of several factors, that taken together with the other information available to Agent DeJoode, made the decision to stop the Jetta a reasonable one.

The existence of the search warrant confirmed that on-going criminal activity likely existed at the Residence. The key issue, for this analysis, is whether the Defendant could reasonably be linked to that activity given Agent DeJoode's information at the time. If so, stopping the Defendant has as he drove away from the Residence was reasonable. *See United States v. Cortez*, 449 U.S. 411, 417 (1981) (basing an analysis of a reasonable or founded suspicion on "the totality of the circumstances – the whole picture"). At hearing, Agent DeJoode testified that CI-1 believed the Hispanic person in the Residence was the methamphetamine source for Boatwright. It is this information, relayed by CI-1 to Agent DeJoode on the day of the warrant execution, that specifically tied the Hispanic male in the Residence to the on-going criminal activity that formed the basis for the search warrant. With no evidence of any other Hispanic person entering or leaving the Residence after he received that information, or that other Hispanic

persons frequented the area near the Residence, Agent DeJoode was justified in his suspicion, based on the totality of the circumstances, that the Hispanic persons leaving the house were tied to the criminal activity inside. *See Terry*, 392 U.S. at 21 (stating that "in making [the] assessment, it is imperative that the facts be judged [by a court] against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?'") (quoting *Carroll v. United States*, 267 U.S. 132 (1925)).

The Defendant makes no objection to the source of information to Agent DeJoode – the cooperating individuals, CI-1 and CI-2. Because CI-1's information, in particular, was crucial to establishing reasonable suspicion in this case, however, an analysis regarding the credibility of CI-1 is warranted. The credibility of CI-1 is based on "evidence of the informant's reliability, veracity, and basis of knowledge. . . ." *See United States v. Ketzeback*, 358 F.3d 987, 991 (8th Cir. 2004) (stating, however, that credibility is not an "independent requirement to be rigidly exacted in every case") (internal quotations omitted). Compared to the description of the CI in *Ketzeback*, there is scant background provided in this case as to CI-1. The search warrant application, however, does contain a stock informant reliability check-list entitled "Informant Attachment." Warrant App. at 12. The application also revealed that CI-1 provided independently corroborated information, had not

given false information in the past, and that CI-1's information was based on personal knowledge. *Id.* Moreover, CI-1 played a key supporting role in Agent DeJoode's investigation, including identifying Boatwright as a drug source, participating in the drug transactions with her, identifying Cannon as another drug source, and participating in recorded telephone calls with Boatwright at Agent DeJoode's direction. *Id.* at 6-7. There is no indication in the warrant affidavit, nor does the Defendant provide evidence, that CI-1 misled law enforcement officials, or was acting from questionable motives. *See Ketzeback*, 358 F.3d at 991-992 (stating that "independent corroboration of even innocuous facts makes it more likely an informant is telling the truth about incriminating ones, and corroboration of innocent behavior can provide the basis for establishing probable cause"). In this case, as observed, Agent DeJoode required mere reasonable suspicion, not probable cause, to believe the Hispanic male in the Residence was Boatright's drug source. Accordingly, reliance on CI-1's information that the person in the Residence just prior to the execution of the search warrant was Boatwright's Hispanic drug source from California, is justified.

In drawing this conclusion, the Court is cognizant of the often difficult relationship between minority groups and law enforcement officials. *See Wardlow*, 528 U.S. at 133 n.9 (citing, at length, several studies and views revealing the perspective of minority groups, including the Chief of the Washington, D.C., Metropolitan Police Department: "[S]izeable percentages of

Americans today – especially Americans of colors till view policing in the United States to be discriminatory, if not by policy and definition, certainly in its day to day application.") (Stevens, J. concurring in part and dissenting in part). Because the standard to support reasonable suspicion is, compared to other standards governing consideration of evidence, exceedingly low, Agent DeJoode's actions pass constitutional muster. That said, the Court is troubled that up until his actual identification was secured, the Defendant was only identified as being part of a racial minority and stopped largely because of that generalized identification. As did the Supreme Court in *Terry*, this Court recognizes that the relationship between law enforcement officials and the citizenry is made up of numerous and diverse encounters. In this case, the law enforcement officials could only decide and act on the information available to them. *See Weaver*, 966 F.2d at 394 n.2 (discussing race as a factor in drug-related cases and though wishing otherwise, stating "we take the facts as they are presented to us, not as we would like them to be"). It is this Court's hope, however, that the Government continues to sensitize its agents to the perceptions of the minority communities it serves, and bear in mind identifications based on generalized racial groupings in support of searches and seizures risk undermining the support that is so crucial to good police work. *See Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandies, J., dissenting) ("Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.").

B. *Patdown, Search, and Arrest*

After the valid traffic stop, Agent DeJoode asked for identification. *See United States v. Ortiz-Monroy*, 332 F.3d 525, 529 (8th Cir. 2003) ("Once a lawful stop has occurred, officers are entitled to conduct an investigation reasonably related in scope to the circumstances which justified the interference in the first place.") (internal citations omitted). There is no dispute that the Defendant offered two separate California documents with the same photographs, but with different subject matter information – an identification card and a driver's license. This alone provides probable cause that the Defendant had violated false document laws or, at the very least, grounds for further investigation. The offering of false documents, particularly when coupled with the reasonable suspicion that the Defendant was involved in drug trafficking, provided a basis for a *Terry* patdown. As Agent DeJoode's investigation progressed, he discovered the Defendant's criminal history included drug violations and false identification charges. Upon more questioning, the Defendant admitted he just arrived at the Residence the day before, further solidifying Agent DeJoode's suspicion that the Defendant was linked to the criminal activity described in the search warrant application. The investigation further revealed the social security number used by the Defendant was issued before the date of birth on the identification document itself, a strong indication that one or both documents offered to Agent DeJoode were falsified. The investigation at the scene, the drive to the

nearby State Patrol Headquarters, and the involvement of BICE all took approximately thirty minutes to accomplish – well within the reasonable time frame necessary to protect the Defendant's constitutional rights in the context of the stop in this case. The arrest of the Defendant and the subsequent legal inventory of the Jetta all flow from the probable cause established in this period. Accordingly, the Defendant's argument that the Government violated his 4th Amendment rights following the traffic stop on July 8, 2004 is unsupported by the facts.

III. CONCLUSION

For the reasons stated herein, Defendant's Motion to Suppress Evidence (Clerk's Nos. 35, 76, and 88) is DENIED. Accordingly, the evidence related to the stop and arrest of the Defendant on July 8, 2004, notwithstanding other evidentiary issues that may arise, is admissible as to the charges alleged against him in the original and superseding indictments. Clerk's Nos. 1 and 41.

IT IS SO ORDERED.

Dated this 23rd day of December, 2004.

/s/ Robert W. Pratt
ROBERT W. PRATT
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-1339

United States of America,

Appellee

v.

Felipe Mendez, Jr.,

Appellant

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:04-cr-199 RP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Colloton took no part in the consideration or decision of this matter.

August 07, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans